Supreme Court of the United States

No. 214

OCTOBER TERM, 1947

MRS. ABA BADGER SUTTLE, Widow, etc.

versus

REICH BROS. CONSTRUCTION CO., et al

On Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit

SUGGESTION OF ERROR AND PETITION FOR A REHEARING

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Of Counsel

HAUSER PRINTING CO., INC., NEW ORLEANS

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To the Honorable, the Supreme Court of the United States:

NOW COMES the petitioner, MRS. ABA BADGER SUTTLE, Widow, etc., through her undersigned attorneys of record, and respectfully represents that there is error on the face of the opinion and decree of this

Honorable Court rendered March 8, 1948, and that the same should be recalled and a rehearing granted herein for the following reasons:

I.

Your opinion failed to notice or decide the only issue presented to the Court, namely, that under the laws of Louisiana the corporate defendant is a resident of the Eastern District of Louisiana, and that the Federal venue statute, in respect to "residents", must be applied to persons, firms and corporations who are "residents" of the District where served.

II.

Your opinion, in effect, holds that there is a Federal common law according to which Federal common law a corporation can be a resident only of the State in which it was incorporated. This ruling is incompatible with the rule of *Eirie Railroad v. Tompkins*, and the numerous cases which followed it, which established that there is no Federal common law.

III.

The issue presented and ignored in this case, i.e., the binding effect of State law on the status of persons within the State's jurisdiction, was not before the Court in any of the cases cited in the opinion herein as authority for the rule that a corporation can be a resident of only the State of its incorporation, and therefore those cases do not justify your conclusion. Those cases were, in all likelihood, properly decided according to the laws of the States where they arose, because Louisiana seems

to be the only State which requires a foreign corporation, as a condition of the right to do business, to consent that it will be a resident of Louisiana for "all purposes of jurisdiction and venue."

IV.

There is error in the statement that only Congress may change the asserted rule of law that a corporation can be a resident of only one State, because of the cases decided over a long period of time. If this is true then the *Eirie Railroad* case was wrongly decided, because it upset a line of cases, unvaried for nearly a century, without the intervention of Congress. This conclusion is also erroneous because Congress has no Constitutional authority to declare who are or who are not residents of a State. It is an unprecedented thing for a Court to hold that a State may not decide for itself who are and who are not residents therein, which is the plain result of a ruling that when the venue statute refers to a "resident" it means something different from a "resident" as defined by the applicable local law. May we repeat that the venue statute does not define a resident.

V.

Lastly, your opinion is erroneous because it will not be a precedent for the decision of the same point if it arises again. If another State requires a foreign corporation to accept the status of residency as a condition for doing business there this same case may arise again and, since there has been no reference whatever made in your opinion to the established status of residency of the corporate defendant under the State law, you will be called on again to decide the matter.

WHEREFORE, petitioner respectfully prays that the opinion and decree rendered herein be recalled and rescinded and a rehearing granted herein.

Respectfully submitted,

ENGLE, LAUB, ADAMS & NORMAN
MILLER & BLOCH

Attorneys for Petitioner

JOHN D. MILLER
Of Counsel

SUPREME COURT OF THE UNITED STATES

No. 214.—October Term, 1947.

Mrs. Aba Badger Suttle, Widow of John G. Suttle, Individually and as Administratrix of the Estate of John G. Suttle, Deceased, etc., Petitioner,
v.
Reich Bros. Construction Co. et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[March 8, 1948.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

We granted certiorari in this case to consider a question arising under the federal venue statutes. Petitioner, a resident and citizen of the State of Mississippi, brought a negligence action based on diversity of citizenship in the District Court for the Eastern District of Louisiana. The defendants in that suit were the respondents Reich Bros. Construction Company, a partnership, and its individual members, residents of the Western District of Louisiana, and Highways Insurance Underwriters, a Texas Corporation which had qualified to do business in Louisiana pursuant to a statute of that State.

Section 51 of the Judicial Code provides that ". . . where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."[1] This general provision is qualified by § 52 of the Judicial Code, which states that ". . . if there are two or more defendants, residing in dif-

[1] Act of March 3, 1887, 24 Stat. 552, as corrected by Act of August 13, 1888, 25 Stat. 433, 28 U. S. C. § 112.

ferent districts of the State, . . . [suit] may be brought in either district, . . ."[2]

It is conceded by the parties that the Texas corporation, Highways Insurance, having qualified to do business in Louisiana is amenable to suit in the federal courts for either the Eastern or Western District of that State.[3] The critical issue of the case is whether Highways Insurance may be regarded as a "resident" of the Eastern District of Louisiana within the meaning of § 52 of the Judicial Code, so that respondents Reich Bros. Construction Company and its individual members may properly be sued as co-defendants of the corporation in the Eastern District of Louisiana, despite the fact that respondents are residents of the Western District of that State.

The respondents moved to dismiss the action on the ground of improper venue. The District Court granted the motion, and the suit was dismissed as to respondents, leaving the action pending against the corporation. The Circuit Court of Appeals affirmed.[4]

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[2] R. S. § 740, 36 Stat. 1101, 28 U. S. C. § 113. The section in its entirety follows: "When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall endorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State."

[3] See *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165 (1939); *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4 (1940).

[4] 161 F. 2d 289 (1947).

The issue we are called upon to resolve is a narrow one. We are not confronted with the abstract question whether, under any circumstances or for any purposes, a foreign corporation may properly be regarded as acquiring "residence" in a State other than that in which it was incorporated. Nor is our problem that of discovering whether, under State law, a qualified foreign corporation is treated as a "resident" of the State in which it is doing business.[5] The sole issue of this case relates to the construction of the term "residence," appearing in the particular federal venue statutes under consideration, as it applies to a foreign corporation.

The "residence" of a corporation, within the meaning of these statutes has frequently been the subject of consideration by this Court for a period of over half a century. Shortly after Congress had enacted § 51 of the Judicial Code in substantially its present form, this Court declared that the "residence" of a corporation, within the meaning of the venue statutes, is only in "the State and district in which it has been incorporated."[6] Thus, in *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 450 (1892), it was said: "This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the State by which it was created, although it may do business in other States whose laws permit it."

For almost sixty years, in an unbroken line of decisions, this Court has applied the same construction.[7] That view

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[5] See *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438, 443–444 (1946); *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 175 (1939); *Ex parte Schollenberger*, 96 U. S. 369, 377 (1878).

[6] *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 449 (1892).

[7] *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 205 (1892); *In re Keasbey and Mattison Co.*, 160 U. S. 221, 229 (1895); *Macon Gro-*

was reaffirmed as recently as 1946 in the opinion of the Court in *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438, 441.[8]

Congress has revealed a similar understanding of the term "residence" when enacting special venue statutes in situations in which it was intended that, at the election of the plaintiff, a corporation should become amenable to suit either in the State of incorporation or in States in which it is carrying on corporate activities. In those statutes, Congress has provided that the venue of such suits should be located not only in the district in which the corporation is a "resident" or an "inhabitant," but also in districts in which it may be "found," "transacts business," or has an agent to receive service of process.[9]

Nor does the decision of this Court in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165 (1939), re-

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cery Co. v. *Atlantic Coast Line R. Co.*, 215 U. S. 501, 509 (1910); *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357, 367 (1910); *Male* v. *Atchison, Topeka & Santa Fe R. Co.*, 240 U. S. 97, 102 (1916); *General Investment Co.* v. *Lake Shore & Michigan Southern R. Co.*, 260 U. S. 261, 274–279 (1922); *Seaboard Rice Milling Co.* v. *Chicago, Rock Island & Pacific R. Co.*, 270 U. S. 363, 366 (1926); *Luckett* v. *Delpark, Inc.*, 270 U. S. 496, 499 (1926); *Burnrite Coal Briquette Co.* v. *Riggs*, 274 U. S. 208, 211 (1927). And see *In re Hohorst*, 150 U. S. 653, 662 (1893); *Galveston, Harrisburg and San Antonio R. Co.* v. *Gonzales*, 151 U. S. 496, 503–504, 506 (1894).

[8] Section 52 of the Judicial Code qualifies or provides an exception to the general provisions of § 51. There would be no basis for the suggestion that Congress intended to attribute a meaning to the term "residence" in § 51 different from that in § 52.

[9] See, *e. g.*, § 12 of the Clayton Act, 38 Stat. 736, 15 U. S. C. § 22: "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." See also § 48 of the Judicial Code, 29 Stat. 695, 28 U. S. C. § 109; § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15; 36 Stat. 291, 45 U. S. C. § 56.

quire that the term "residence" be construed differently. In that case, the plaintiffs, citizens and residents of New Jersey, brought suit based on diversity of citizenship against the defendant, a Delaware corporation, in the Southern District of New York. This Court held that the venue requirements in the federal courts may be waived and that the defendant, since it had appointed an agent to receive service of process in New York pursuant to a statute of that State, might not insist upon suit being brought in Delaware, the State of its incorporation, or in New Jersey, the State in which plaintiffs resided. But this Court did not hold that in losing the privilege of insisting upon suit in districts specified in § 51 of the Judicial Code, the defendant corporation thereby acquired "residence" in New York, within the meaning of the venue statutes. Indeed, the Court specifically stated that the suit "was not brought 'in the district of the residence of either the plaintiff or the defendant.'" [10]

For the reasons stated, we hold that the Highway Insurance Underwriters, a Texas corporation and respondents' co-defendant, is not a resident of the Eastern District of Louisiana in which suit was brought, within the meaning of § 52 of the Judicial Code. While, concededly, the Texas corporation has made itself amenable to suit in the federal courts of either district in Louisiana by qualifying to do business in that State, such action on the part of the corporation may in no way be regarded as a waiver by respondents of the privileges conferred upon them by the venue statutes. Section 51 in general terms provides that a diversity suit of the sort involved here must be brought either in the district in which the plaintiff resides or in which the defendant resides. This suit, brought in the Eastern District of Louisiana, satisfies

[10] *Neirbo* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 167 (1939).

neither requirement. Respondents' privilege conferred by § 51 can be defeated either by waiver on the part of respondents or, as provided in § 52, by petitioner bringing suit against respondents and others in a district in Louisiana in which one of the co-defendants has acquired residence but in which respondents do not reside. Neither circumstance is present here. Respondents made timely assertion of their privilege and may not be deemed to have waived their venue objections. As we have held, their co-defendant, Highway Insurance Underwriters, may not be regarded as a resident of the Eastern District of Louisiana in which suit was brought. It follows, therefore, that respondents' objections to venue were well taken, and that, in sustaining those objections, the District Court and the Circuit Court of Appeals reached a result in accord with the requirements of the federal venue statutes as consistently construed by this Court. If those requirements are to be altered, it is a task which must be undertaken by Congress.

Affirmed.